person not being a Malay provided that leases of reservation land shall be valid to the extent specified in subsections (ii) to (v) below, save as provided in this Enactment."

And section 13A provides:—

"His Highness the Ruler in Council may approve

(a) .. .. ..

(b) .. .. ..

(c) the transfer or transmission of any reservation land acquired by virtue of this section, by any person not being a Malay, to any other person not being a Malay, subject to the imposition of such restriction in interest and such conditions in the document of title and such terms of rent as he may think fit: and the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, under the Land Enactment may be registered if presented with a certificate signed by the State Secretary in the form of Schedule C.

Section 7(i) may be divided into two parts.

(1) No right or interest of any Malay in reservation land.

(2) No right or interest in such land acquired by virtue of section 13A by any person not being a Malay.

The land in this case was owned by a non-Malay and no right or interest was acquired by him by virtue of section 13A. Therefore, section 7(i) does not apply. Accordingly the appeal should be dismissed with costs.

Azmi J.: I have had the opportunity of reading the judgment of Suffian J. in this appeal and I agree with him that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Wan Mustapha & Co.; Isahak Hamid & Co.*

LING NGUONG HOCK v. TING TING UNG

[O.C.J. (McGilligan J.) February 11, 1964]

[Sibu — High Court Civil Appeal No. 16 of 1963]

Contract—Agreement for sale of a motor-lorry—Payment of deposit by purchaser—Sale to be completed in 15 days—Motor-lorry handed to purchaser—Sale not completed—Motor-lorry recovered by seller—Whether seller entitled to retain deposit or liable to refund it.

The appellant contracted with the respondent to sell to the respondent his motor-lorry. The respondent paid $300 as deposit. It was agreed between the parties that the sale would be completed in 15 days and this was reduced into writing. The sale was not however completed and the appellant recovered from the respondent the motor-lorry which the respondent had been using as from the date of the contract. The respondent then brought an action to recover the $300 paid as deposit by him to the appellant. The magistrate in the Court of Small Causes found for the respondent. On appeal

Held: there was evidence to show that it was the respondent who defaulted on the contract by failing to produce on due date and even thereafter the balance of purchase money required to complete the sale. As a deposit is primarily a security that the purchaser will complete and as in this case it was the purchaser who had defaulted, the seller was entitled to keep the deposit.

Howe v. *Smith* (1) and *Stockloser* v. *Johnson* (2) followed

Cases referred to:—

(1) *Howe* v. *Smith* (1887) 27 Ch. D. 89.

(2) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

CIVIL APPEAL.

Parties in person.

McGilligan J.: This is an appeal from the Court of Small Causes, Sibu. In that Court the respondent was plaintiff and the appellant was defendant.

It is common ground between the parties that they entered into an agreement for the purchase by the respondent and the sale by the appellant of a motor lorry (or of a share in a motor lorry, it is not clear which). One must presume the appellant had some right to sell, though the lorry appears to be in the name of another man. Part of the terms of the agreement were reduced to writing, and a written agreement called "agreement of security money" was executed by both parties. It reads as follows:—

"Lorry No. S. 662 owned by Ling Sing Teck who now wishes to sell half share of the lorry to Ting Ting Ung and received $300.00 (Dollars Three Hundred only) as surety money for the purchase of the said lorry. Half a month later a proper agreement shall be made. Later on if the seller does not want to sell the seller shall indemnify Dollars Three Hundred only ($300.00). If the purchaser does not want to buy, the surety money shall be forfeited. There will be no grumble."

It is not clear from the (as usual inadequate) evidence in the lower Court what sum was agreed on as the purchase price. The respondent said the price was $3,000.00. The appellant said he intended to sell the lorry at half the original price of $3,000.00. The written agreement speaks of the sale of a half share in the lorry. It is all rather confused and confusing, but as it happens the exact purchase price (it must have been at least $1,500.00) is immaterial in the circumstances and on the view I take of this case, and it is certain that (a) the respondent paid a deposit of $300.00 at the time of the execution of the written agreement, and (b) in the words of the written agreement "half a month later a proper agreement shall be made". These latter words meant, it may be taken, that the lorry (or a share in it) was to be formally transferred to the respondent by the execution of the proper document 15 days after the signing of the written agreement. That is plain from the evidence of the plaintiff's witness Lo Teck Ming, who said

"It was also promised that the proceeding in proper transfer of the said lorry would be done before June 15, 1963."

and the evidence of the appellant, who said

"On June 31, 1963 we had made an agreement ourselves that I first got an advance from plaintiff of the sum of $300.00 and agreed to make a proper transfer after 15 days."

The contract was, however, not completed. The appellant received no further payment, and the lorry (or a share in it) was not transferred to the respondent. The respondent then sued for the return of the $300.00 deposit, and for damages. The magistrate in the Court of Small Causes gave judgment in favour of the respondent, ordering merely that the $300.00 deposit be returned to him. In giving judgment he said

"It is hard to believe the story in both parties. If plaintiff actually has the intention to accept the transfer he should prepare everything and come to the office for registration and so was the defendant.

In such a case since plaintiff had advance to defendant the sum of $300.00 I order that the defendant should return the money to plaintiff and in view of the fact that plaintiff did make use of the lorry for sometime the Court give no order for other costs."

Appellant has now appealed against that judgment. His written grounds of appeal read as follows:—

"1. The finding of the learned trial magistrate cannot be supported by the evidence adduced.

2. The learned trial magistrate did not consider that the plaintiff was wrong and has made a breach of contract in the matter in question.

3. The plaintiff's statement to court was false and was not supported by any corroborative evidence favourable to him from the plaintiff's witnesses.'

The issue between the parties is simple enough: the appellant says that the respondent defaulted by failing to pay any more than the $300.00 deposit and by not wanting to go on with the sale; the respondent says the appellant defaulted by failing to transfer (that is, by failing to execute such documents and do such things as were necessary to pass ownership of the lorry — or a share in it — to the respondent).

The learned trial magistrate obviously found it difficult to decide between the parties. In fact he as good as said he was unable to do so; "It is hard to believe the story in both parties" he said. That being so, it might well be said that he should have found against the respondent/plaintiff — on whom the onus of proof was — for failing to prove his case (obviously he did not consider he had proved it) and should have dismissed that case. On that view, the appeal should succeed.

That is not all there is to it, however, for there was written evidence before the lower Court (it is also before this one) that the appellant was to transfer ownership by June 15, 1963, and it is certain he did not do so. Is not that alone sufficient to have established the respondent's/plaintiff's case, and should the learned trial magistrate not have found accordingly? I consider not, because it is the almost invariable arrangement in sales where a deposit is made (as here, as an earnest and in part payment of the purchase price) that the transfer will be completed and the purchase price (or at least an instalment of it) paid at the same time. That must have been the agreement (and the learned trial magistrate should have so held, and in fact it would seem from his judgment that this was his view). Otherwise why was the legal transfer not made as soon as the written agreement was signed? The words in that agreement "Half a month later a proper agreement shall be made" must obviously mean that then something more was to be done by both parties.

It comes back to this then that the respondent had to prove that because of the appellant's default the sale went off, the contract was not completed. As I have said the learned trial magistrate clearly did not accept that the respondent had proved this, and he should have found accordingly. I, also, agree that the respondent/plaintiff failed to prove his case, and in fact would go further. There is good evidence on which the learned trial magistrate could have found that it was the respondent who defaulted and was not prepared to carry out the bargain. His own witness said as much; he said

"Plaintiff used the lorry until June 15, 1963 and the transfer was not dealt with yet and until June 17, 1963 still nothing has been done. Then defendant came to plaintiff to get the key of the said lorry and defendant took the lorry home and said if plaintiff paid $700.00 he then allowed him to use it again. I then approached the plaintiff whether he would pay $700.00. Plaintiff refused he insisted to claim back the $300.00."

[There was also what happened during the course of the trial. At one stage the parties agreed to go on with the sale if the respondent then produced $700.00. The trial was adjourned in the hope that the agreement could then go through; but nothing happened and the trial was later resumed, one must presume because the $700.00 was not produced.] In my judgment the learned trial magistrate, on the evidence before him, should have found against the plaintiff found at the least that he had failed to prove his case, and this Court now so finds.

Does it therefore follow that the appellant is entitled to keep the deposit of $300.00, or must he return it or some part of it? In my judgment he is entitled to retain it. I take the following to be a correct, if general, statement of the law.

"A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price. According if the buyer is unable or unwilling to accept and pay for the goods, the seller may repudiate the contract and retain the deposit."

Here the buyer has, at the least, failed to prove that he was willing and able to pay, in fact there was the evidence of his own witness that he was unwilling to pay. The seller, the appellant, may not have repudiated the contract, but if he has not done so, expressly or impliedly, he is entitled either to repudiate it now and retain the deposit, or to retain the deposit and wait to see if the respondent will complete the contract.

The case of *Howe* v. *Smith* [1] may be cited as supporting the statement of law just made. There Cotton L.J., stated, quoting from the case of *Collins* v. *Stimson*:

"What he says is this, 'According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.' That was the principle of his decision."

It is true that in that case Cotton L.J. also said

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprove him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. In those circumstances, in my opinion, the rule is correctly laid down in Lord Justice James's judgment (of course the case there was stronger than the one we have to deal with) where the representatives of the purchaser had neither in law nor in equity the right to the return of the deposit."

but here it was for the respondent to prove that the appellant repudiated the contract, and he failed to do so or to prove that he himself did not repudiate it; in fact the magistrate could well have found that it was he who repudiated the contract.

Again in the case of *Stockloser* v. *Johnson* [2] Denning L.J. made the following statement

"But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman* v. *Drinkle*, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Summer."

The facts of that case were considerably different from this one, and as far as the reference is to money expressly paid as a deposit I think those words were "obiter dicta". Further Bowen L.J. in giving his judgment in the same case did not agree with them. They cannot, I consider, be considered as deciding the law on the point, and even if they do, I am quite satisfied that this is not a case in which any relief from forfeiture (if such a relief can be given) should be given.

This appeal is allowed, and the decision of the learned trial magistrate is reversed. In the effect, the respondent/plaintiff's original claim is dismissed.

The appellant is awarded $20.00 costs of this appeal.

Appeal allowed.

OTHMAN MAT v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) & Chua J.) February 24, 1964]

[Singapore — Federal Court Criminal Appeal No. 12 of 1963]

Penal Code, s. 300, Exception 1—Murder—Defence of grave and sudden provocation—Whether adequately put —Whether misdirection—Defence of diminished responsibility.

The appellant was found guilty by the jury of the murder of one MT and sentenced to death. At the trial there were two versions of the whole incident. The appellant's version briefly was that he had some trouble with the deceased's wife as to the use of the bathroom and that that afternoon the deceased challenged the appellant to come out, pulled the appellant out of the room where he was playing cards, insulted him and then aimed a kick at his testicles and then punched him on the eye causing the appellant "to see stars" and the deceased then rushed at him with both hands raised when the appellant retreated to his room. The appellant also called Doctor W, the Deputy Medical Superintendant of Woodbridge Hospital who stated that he examined the appellant on June 24, 1963 while he was awaiting trial and found that he was not suffering from any form of mental illness. On July 3, 1963 Doctor W again examined him and found that he was suffering from schizophrenia which according to the doctor was possibly precipitated by the mental strain of awaiting trial. When the doctor again examined him on August 20, 1963 the apppellant was found then to be of sound mind and capable of making his defence. The doctor also stated that the half inch laceration suffered by the appellant over the right eyebrow over the frontal bone could cause cerebral concussion and confusion resulting in the impairment of the higher mental functions like his sense of ethics, prudence, self restraint and judgment.

On appeal against conviction and sentence it was argued that the learned trial Judge misdirected the jury in dealing with the evidence which could constitute grave and sudden provocation, or alternatively that he did not give an adequate direction as to the evidence available which could constitute grave and sudden provocation. The second ground of appeal was diminished responsibility.

Held: (1) the defence of provocation was sufficiently put and left for the consideration of the jury and there was nothing in the summing up which was inconsistent with the Privy Council decisions in *Chan Kau* v. *R.* [1] or *Lee Chun-Chuen* v. *R.* [2];

(2) on the evidence of the medical witness and other evidence at the trial there was no such unchallenged evidence that the appellant was suffering from abnormality of mind as substantially impaired his mental responsibility for his acts that it can be rightly said that the verdict of murder was unreasonable and cannot be supported by evidence.

Cases referred to:—

(1) *Chan Kau* v. *R.* [1955] A.C. 206.

(2) *Lee Chun-Chuen* v. *R.* [1963] A.C. 220.

(3) *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588.

(4) *Ho Chun Yuen* v. *R.* [1961] Hk. L.R. 433.